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FILED
JUL 24 1958
JOHN T. FEY, Clerk

No. 142

In the Supreme Court of the United States

OCTOBER TERM, 1958

BROWN-FORMAN DISTILLERS CORPORATION,
APPELLANT

v.

COLLECTOR OF REVENUE,
APPELLEE

On Appeal from the Supreme Court of the State of Louisiana

Motion to Dismiss on Behalf of the Collector of Revenue

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Appellee, through undersigned counsel of record, respectfully moves that this appeal be dismissed on the following grounds:

I.

This appeal presents no case or controversy within the meaning of Section 2 of Article III of the Constitution of the United States in that appellant waived its right to appeal and subsequent thereto the taxes for which recovery is sought were transferred from the segregated fund established by law into the

treasury of the state for expenditure, thus making the cause moot; there is accordingly no subject matter upon which the judgment of this Court can operate.

II.

This appeal is in effect, by virtue of appellant's action in acquiesing in the judgment of the court below, a suit against the state to which the state has not given its consent and this Court is therefore without jurisdiction to hear the appeal.

STATEMENT

This is an appeal from a final judgment and decree of the Supreme Court of Louisiana.

Appellant paid certain *net income* taxes under protest and instituted suit for recovery thereof, all pursuant to Section 1576 of the Louisiana Revised Statutes of 1950, set out in full in Appendix II of this motion.

The petition alleged very few facts and concluded that the levying of a net income tax upon petitioner was contrary to the Constitution of the United States, and particularly the commerce clause thereof. (District Court petition, Articles 4 through 7, inclusive). The Collector filed exceptions of no cause and no right of action (demurrer), which were sustained by the District Court. Appellant timely appealed and the Louisiana Supreme Court affirmed the decision of the Court below.

The case has never been heard on its merits, and the only facts involved are the facts alleged in the

petition, which for the purposes of the exception only, were considered to be true.

As will appear from Appendix I of this motion, appellant advised after the Louisiana Supreme Court denied its application for a rehearing, that writs would not be applied for, and the moneys involved were subsequently transferred from an escrow account into the State Treasury with the full knowledge of and without objection by appellant.

More than one month later, appellant filed this appeal.

ARGUMENT

I.

Under the facts of this case, there is no subject matter upon which the judgment of this Court can operate, and any opinion rendered herein would of necessity be advisory only.

Although appellee has divided this argument in favor of the motion to dismiss into two parts, both are based upon one very simple fact.

After the Louisiana Supreme Court denied a rehearing, appellant advised that writs would not be applied for, thereby indicating that this particular litigation had been concluded. Thereafter, appellee advised that the funds involved were being removed from escrow and this removal was subsequently completed without objection from appellant.

It is submitted that appellant's action in advising appellee that writs would not be applied for was tanta-

mount to a waiver of its right of appeal. Accordingly, the appeal should be dismissed upon the authority of the following statement in the case of *Mills v. Green*, 159 U. S. 651, 652, 16 S. Ct. 132, 40 L. Ed. 293:

> "The duty of this court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it. It necessarily follows that when, pending an appeal from the judgment of a lower court, and without any fault of the defendant, an event occurs which renders it impossible for this court, if it should decide the case in favor of the plaintiff, to grant him any effectual relief whatever, the court will not proceed to a formal judgment, but will dismiss the appeal. And such a fact, when not appearing on the record, may be proved by extrinsic evidence. *Lord v. Veazie*, 8 How. 251; *California v. San Pablo & T. R. Co.*, 149 U. S. 308, 13 Sup. Ct. 876."

Certainly, a stronger case for dismissal exists here because the 'event rendering it impossible for the Court to grant effectual relief' was brought about by appellant itself—not an outside factor over which it had no control.

As appellant cannot now recover the taxes paid under protest since they were paid into the Treasury in reliance upon appellant's written statement that no appeal would be taken, it is also submitted that any opinion rendered herein would be advisory only. This would do violence to the fixed principle of constitu-

tional law that the Supreme Court will not render advisory opinions.

As recently as 1951, in the case of *Amalgamated Ass'n of Street, Electric Railway & Motor Coach Employees of America, Division 998, et al. v. Wisconsin Employment Relations Board*, 340 U. S. 416, 418, 71 S. Ct. 373, this Court reiterated that principle saying:

> "It is argued that the Wisconsin courts have adopted a practice of deciding questions of importance even though the case has become moot, and we are urged to follow that same practice. But whatever the practice in Wisconsin courts, 'A federal court is without power to decide moot questions or to give advisory opinions which cannot affect the rights of the litigants in the case before it. *United States v. Alaska S. S. Co.*, 253 U. S. 113, 115, 116, 40 S. Ct. 448 [449], 64 L. Ed. 808, and cases cited; *United States v. Hamburg-Amerikanische Packet-Fahrt-Actien Gesellschaft*, 239 U. S. 466, 475-477, 36 S. Ct. 212, 216, 60 L. Ed. 387.' *St. Pierre v. United States*, 1943, 319 U. S. 41, 42, 63 S. Ct. 910, 911, 87 L. Ed. 1199."

II.

In light of the events transpiring between the final decision below and this appeal, the case is no longer a suit for recovery of taxes, but is instead an unauthorized suit against the state, and this Court is therefore without jurisdiction.

It should also be noted that the judgment was executed when appellee transferred the funds from the

escrow account after receipt of appellant's advice that writs would not be applied for.

Had this action taken place between the lower court decision and the appeal to the Louisiana Supreme Court, appellant would have been governed by the provisions of Article 567 of the Louisiana Code of Practice, the pertinent part of which reads as follows:

" * * *

"The party against whom judgment has been rendered can not appeal:

"1. If such judgment have been confessed by him, *or if he have acquiesced in the same, by executing it voluntarily.*

" * * *."

(Emphasis supplied).

The facts of this case, it is submitted, would have required a conclusion that the appellant had lost its right to appeal.

While this provision relates to Louisiana procedure, as opposed to federal procedure, it lends support to our contention that the case was concluded when the moneys were transferred. This being so, the allowance of this appeal would be tantamount to allowing appellant to bring suit against the state in the Supreme Court of the United States—a suit seeking a declaratory judgment concerning possible liabilities for future taxes.

Such an action could not be brought directly since it is not one over which this Court has original juris-

diction. Similarly, the Eleventh Amendment to the United States Constitution expressly prohibits federal courts from exercising jurisdiction in suits between a state and its citizens. Certainly, appellant should not be allowed to do indirectly what it is expressly prohibited from doing directly.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the appeal should be dismissed.

Robert L. Roland
Counsel for Appellee

July , 1958.

Appendix I

Additional Statement of Facts

Appendix II

Louisiana Statutes Involved

PROOF OF SERVICE

I, Robert L. Roland, attorney of record for appellee in this matter and a member of the bar of this Court, do certify that a copy of this brief was served upon appellant by depositing same this ..... day of July, 1958, in a United States post office, first-class postage prepaid, addressed to the Honorable Harry McCall, attorney of record for appellant, at 1500 National Bank of Commerce Building, New Orleans 12, Louisiana.

Robert L. Roland

APPENDIX I

Additional Statement of Facts

These facts developed after the rehearing was denied by the Louisiana Supreme Court on March 17, 1958, and are therefore not in the record.

1. Mr. Burke, attorney for appellant, wrote Mr. Roland, attorney for appellee on March 20, 1958, saying, "I have checked with Brown-Forman and want to let you know that we will not apply for writs."

2. Mr. Roland replied to that letter on March 24, 1958, thanking Mr. Burke for his letter and advising, "We are transferring the payments from escrow into current collections."

3. Mr. Roland advised the income tax division on May 1, that the Brown-Forman litigation had been terminated and requested that the division take appropriate action to transfer the funds from escrow into current collections.

4. On May 14, 1958, Mr. Ward, Chief of the Income Tax Division, authorized Mr. Frederic, Chief of the Cashiers Division, to transfer the $34,045.06 involved from escrow into current collections.

5. On May 16, 1958, the transfer was accomplished by escrow transfer No. 440, check No. 3363.

APPENDIX II

Louisiana Statutes

§ 1576. Payment of tax under protest; remedy at law for recovery

A right of action is hereby created to afford a

remedy at law for any person aggrieved by the prohibition of courts restraining the collection of tax, penalty, interest or other charges imposed in this Sub-title. The person resisting the payment of any amount found due by the collector, or of enforcement of any provisions of this Sub-title, shall pay the amount found due to the collector and at that time shall give the collector notice of his intention to file suit for recovery thereof. Upon receipt of this notice, the amount paid shall be segregated and held by the collector or his duly authorized representatives for a period of thirty days. If suit is filed within the thirty-day period for the recovery of such amount, the funds segregated shall be further held pending the outcome of the suit. If the person prevails, the collector shall refund the amount to the claimant, with interest at the rate of 2% per annum covering the period from the date said funds were received by the collector to the date of refund.

This Section shall afford a legal remedy and right of action in any state or federal court having jurisdiction of the parties and subject matter, for a full and complete adjudication of any and all questions arising in the enforcement of this Sub-title, as to the legality of any tax accrued or accruing or the method of enforcement thereof. In such action, service of process upon the collector shall be sufficient service, and he shall be the sole necessary and proper party defendant in any such suit.

This Section shall be construed to provide a legal remedy in the state or federal courts, by action at

law, in case such taxes are claimed to be an unlawful burden upon interstate commerce, or the collection thereof, in violation of any Act of Congress or the United States Constitution, or the Constitution of the State of Louisiana, or in any case where jurisdiction is vested in any of the courts of the United States.

Upon request of a person and proper showing by such person that the principle of law involved in an additional assessment is already pending before the courts for judicial determination, such person, upon agreement to abide by the decision of the courts, may pay the additional assessment under protest, but need not file an additional suit. In such cases the tax so paid under protest shall be segregated and held by the collector until the question of law involved has been determined by the courts and shall then be disposed of as therein provided.

Louisiana Code of Practice

Article 567. Judgment debtor—When barred from appealing:—The party against whom judgment has been rendered can not appeal:

1. If such judgment have been confessed by him, or if he have acquiesced in the same, by executing it voluntarily.

2. If he has suffered the time prescribed by law for appealing to elapse.